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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No 74-266

STANLEY V. TUCKER,

Petitioner

-v-

DAVID T. WIGGINS, ET AL

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

STANLEY V. TUCKER
Petitioner
Box 35
Hartford, Conn 06101

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IN THE
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October Term, 1974
No _____

STANLEY V. TUCKER,

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DAVID T. WIGGINS, ET AL

Respondents

PETITION FOR A WRIT OF CETTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitoner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit Dismissing Petitioner's Appeal, Timely Motion To Re-Open Judgment of Dismissal was filed and denied July, 1974

There has been no prior action by This Court in respect to this action.

CITATION TO OPINIONS BELOW

The decisions below are unreported to the best information and belief of Petitioner. The Judgment of Dismissal made January 15th, 1974 is printed in Appendix A1 and the Order Denying the Motion to Re-Open Judgment of Dismissal is printed in the Appendix B1.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC 1254 (1)

QUESTIONS PRESENTED

1. Was Petitioner denied due process of law by notice of motion mailed to the wrong address?

2. Where Petitioner filed $250 cost bond in cash under local rule 7 does this bond meet the requirements of FRAP Rule 7 where Respondents incurred no costs in the district court?

3. If Petitioner was in error on adequacy of his $250 cost bond posted in the district court then was Petitioner entitled to ten days within which to post added bond?

4. Was Respondents Motion To Dismiss Defective in Not showing grounds for increase of Cost Bond?

5. Did Respondents "waive" their right to added cost bond by waiting until after the record and brief were filed in 2nd CA?

CONSTITUTIONAL AND STATUTORY PROVISIONS

This Petition involves the due process and equal protection clauses of the 5th and 14th amendments. At issue is the adequacy of a $250 cash cost bond posted under local Rule 7 USDC-Conn to cover cost on appeal under FRAP RULE 7.

STATMENT OF FACTUAL BACKGROUND

Petitioner filed a civil rights action in the District Court of Connecticut for declaratory and injunctive relief and damages.

Under the Basic Building Code of Conn. Petitioner had erected a small apartment building in Hartford, Conn. complete with its own water supply and fully compying with all ordinances and statutes and on completion was entitled as a matter of law to a certificate of occupancy. All data pertinent to the water supply was delivered to the State Health Department. Defendant David T. Wiggins is an officer of the State Health Department and primarily responsible for many of the wrongs Petitioner complains of.

Without notice or hearing Petitioner was denied his Certificate of Occupancy suffering lost rents and increased construction costs. The water supply was neither approved nor disapproved.

Instead secret conspiratorial letters, instructions and orders were issued by the State Health Department Officers going to City Health Officers and City Building

Inspectors to the effect that without notice or hearing of any type Petitioner was to be denied the Certificate of Occupancy needed.

This Civil Rights Action directly resulted.

STATMENT OF THE CASE

The action was dismissed in the district court for alleged lack of jurisdiction without the respondents incurring any costs. Under Local Rule 7 USDC-Conn Petitioner filed a cash bond for costs of all types for $250.

Timely the Petitioner filed his Notice of Appeal October 30th, 1973. Timely on Nov 27, 1973 Petitioner filed his designation of record and statement of issues. On December 7th, 1973 the Record was filed in the 2nd CA.

Timely the record fee was paid and on Jan8 th 1974 Petitioner filed and served his Brief in the 2nd CA.

On all of the documents filed in the 2nd CA Petitioner included on the cover his correct address as required by FRAP RULE 32.

Meanwhile unknown to Petitioner the counsel for the state defendants, David Della-Bitta, had mailed a motion to dismiss to an obsolete address of Petitioner and without any notice to Petitioner the 2nd CA dismissed the action on January 15th, 1974.

On receipt of a copy of the judgment of dismissal Petitioner timely filed a Motion To Re-Open Judgment. Months passed without action by the Court. On May 6th, 1974 Petitioner filed an Application to Increase Cost Bond

and tendered with the application was an added $250 in cash effectively increasing bond from the $250 formerly on file to the total of $500. This application was never ruled on by the 2nd CA although the moneys were retained and are held to this date.

On July29, 1974 the 2nd CA denied the Motion to Re-Open Judgment of Dismissal

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SUBSTANTIAL REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND THE CIRCUIT COURTS OF APPEAL

Mullane v Central Hanover Trust Co
339 US 306.

> "The right to be heard has little reality or worth unless one is informed that the matter is pending and can chose for himself whether to appear or default, acquiesce or contest."

In this action the motion to dismiss was mailed to the wrong address and this Petitioner had no opportunity to chose whether to defend or default.

Spaidach v Family Finance Corp
395 US at P 343.

> "I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity.... of the underlying claim before he can be deprived of his property..."

In this action this Petitioner was denied his valuable appeal rights without any notice of the hearing that took place. Fundamental federally guaranteed rights to due process were ruthlessly violated by the motion to dismiss that was never in fact served upon Petitioner.

Snaidach P 339: "The right to be heard has little meaning unless one is fully informed."

See also Schroder v City of NY, 371 US 208 At P 211:

"We hold that the newpaper publications and posted notices in the circumstances of this case did not measure up to the quality of notice which the Due Process Clase of the 14th Amendment requires."

In this Action Asst Attorney General David Della-Bitta did not even bother to publish his notice of hearing in the Hartford papers (Times or Courant) nor did he post the notice of hearing in the federal courthouse or post office but in fact gave no notice at all to Petitioner.

In Boddie v Conn 401 US 371 The US SUPREME COURT went so far as to hold invalid and unconstitutional a Connecticut state law requirment for payment of court cost prior to filing suit on grounds such a law denied due process to theindigent.

Boddie P 371: "Due Process of law prohibits a state from denying solely because of inability to pay court fees and costs access to the courts."

Compare the generous interpretation of "due process" in Beddie, supra, with the harsh unconsionable treatment of Petitioner by the 2nd CA where after an all purpose cost bond of $250 was posted the action dismissed for alleged "failure to post bond" and after the bond voluntarilly increased to $500 the 2nd CA denied the motion to re-open the judgment of dismissal.

TRULY THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE US SUPREME COURT.

II. RESPONDENTS WAIVED THEIR RIGHTS TO ADDED COST BOND OR DISMISSAL BY WAITING UNTIL AFTER APPELLANT's BRIEF ON FILE

Prior cases have held that a motion for added cost bond or dismissal must be timely and respondents cannot wait until appellant has expended costs and effort and perfected the appeal and then come in with a "surprise" motion for added cost bond which perhaps appellant cannot meet thus exposing appellant to lost time and money in briefs, record, etc., paid for and all ready to go.

Portland Construction Co 284 F Supp 774 at P 775:

> Defendant by inaction in waiting to serve demand for security for costs on ground of nonresidency of plaintiff and its alleged insolvency until four years after filing of suit and after two weeks of trial was estopped from asserting its rights under Virgin Islands Code providing for security for costs. 5 V.I.C. § 547.

See also 20 Am Jur 2d Sections 42 & 43:

"If security is not furnished by plaintiff the cause does not stand dismissed. ..... Tender of the cost bond before actual dismissal has been held sufficient"

Missouri P R Co v Richmond
11 SW 555

In this action months before the motion to dismiss was filed Petitioner had paid an all purpose $250 cash bond for costs with the Clerk of the District Court.

See also Marder v Food Fair Stores Inc
157 F Supp 553

> "In view of the fact that the plaintiff has already expended much time as well as money and because we feel that the defendants have failed to move seasonably ... the defendants motions (for security for costs) are denied."

Another case holding it injustice to dismiss or require added security late in the game is:

Clair v Philadelphia Storage Batter Co
29 F Supp 299

> "It would be hard lines for a plaintiff who has been led to prepare a case for trial to be non-suited because of a failure to give security"

The above phrase "hard lines" is most appropriate to the action of the 2nd CA in this action in dismissing without notice after security paid and brief filed.

III. THIS COURT UNDER PRIOR RULINGS CAN HOLD CONN USDC LOCAL RULE 7 VAGUE AND UNCONSTITUTIONAL

The language in local Rule 7 of USDC-Conn calling for $250.00 in security for "costs" is without limiting language and any reader such as this Petitioner may reasonably conclude the costs include any costs that may be incurred in the action including "appellate costs".

Rule 7 USDC-Conn: "(a) Costs. At any time after commencement of an action, each defendant is entitled on request to thec clerk to an order to be entered by the clerk, as of course, for a deposit or bond with sufficient surety in the sum of $250.00 to be given within 30 days after entry of such order. Additional or other security or justification of financial responsibility by any surety may be ordered by the court at any time during the pendency of the action for good cause shown on motion duly noticed."

That Petitioner met the requirements of local rule 7 is unquestioned.

Yet without actual notice to Petitioner and in violation of "duly noticed" requirements of local rule 7 the Respondents moved for dismissal or added cost bond. There was no showing of "good cause" in their application only a brazen allegation that no cost bond was posted which of course factually was at variance with the $250 bond posted under local rule 7.

Under factual conditions equivalent to this action in prior case the U S SUPREME

has ruled cost bond requirments as violative of due process because of vagueness and absence of any standards.

Giaccio v Pennsylvania
Jan 19, 1966
382 US 399

3. Constitutional Law ⇐258

Law fails to meet requirements of due process clause if it is so vague and standardless that it leaves public uncertain as to conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. U.S.C.A.Const. Amend. 14.

Yet under the facts of this case This Court is asked to alternatively reverse and remand on strenght of Giaccio, supra, or grant certiorari to consider the constitutionality of local rule 7 under Giaccio standards.

IV ALLEGED FAILURE TO FILE ADDED COST BOND IN THE COURT OF APPEAL IS NOT GROUNDS FOR DISMISSAL WHERE THE RESPONDENTS SUFFERED NO COSTS IN THE DISTRICT COURT

In the district court the action was dismissed on motion, and the respondents suffered no costs, claimed no costs and were not entitled to award of any costs. Thus the facts fit the classic pattern where prior cases have held that where there is no showing of predjudice to appelles that the lack of cost bonds is not grounds to dismiss.

See Moores Fed Practice Vol 9 S 203. 12

"Failure to file the cost bond is not ground for dismissal of appeal where no specific relief is asked on this score and where there is no showing of disadvantage to the appellees."

St Marie v U.S. 9th CA 1940

108 F 2d 876

Cert denied 311 US 652.

CONCLUSION

This court is requested on the strength of St Marie, supra, or Giaccio, supra to reverse summarilly and remand for further proceedings consistent with due process or in the alternative to note probably jurisdiction.

RESPECTFULLY SUBMITTED:

By_____

PETITIONER

STANLEY V. TUCKER

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

January 15th, 1974

STANLEY V. TUCKER

Plaintiff-Appellant

-v-

DAVID T. WIGGINS, ET AL

Defendant-Appellees

It is hereby ordered that upon consideration of the motion made by counsel for appellees to dismiss the appeal from the USDC-Conn for failure to file a cost bond or in the alternative to direct appellant to file a bond for costs in the minimum amount of $ 250. that the motion to dismiss is granted.

BEFORE : HON LEONARD P MOORE
HON HENRY J. FRIENDLY
HON ROBERT P ANDERSON

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

July 29th, 1974

STANLEY V. TUCKER

Plaintiff-Appellant

-v-

DAVIT T. WIGGINS, ET AL

Defendant-Appellees

The Motion To Re-Open Judgment of Dismissal Is hereby Denied.

BEFORE: HON LEONARD P MOORE

HON ROBERT P ANDERSON

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CONN)
County of Hartford) ss

I, STANLEY V. TUCKER, do hereby state that on the 6th day of Sept 1974 I served three copies of the within Petition For Certiorari on the Apppellees by mailing postage prepaid first class mail by depositing postage prepaid in the US mails at Hartford, Conn addressed as follows:

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Dated Sept 6th 1974

By Stanley V. Tucker
STANLEY V. TUCKER

Sworn and subscribed to before me this 6th of Sept 1974

By Robert M Langrano NOTARY PUBLIC

My Commission Expires Mar. 31, 1979

My commission expires _____